

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

REBEKAH JENNINGS; BRENNAN)
HARMON; ANDREW PAYNE;)
NATIONAL RIFLE ASSOCIATION OF)
AMERICA, INC.,)
Plaintiffs,)
v.)
STEVEN McCRAW, in his official)
capacity as Director of the Texas)
Department of Public Safety,)
Defendant.) Civil Action No. 5:10-CV-141-C

ORDER

Plaintiffs' Second Amended Complaint, filed July 11, 2011, challenges the constitutionality of Texas Penal Code § 46.02 and Texas Government Code § 411.172. Plaintiffs have named Steven McCraw, in his official capacity as Director of the Texas Department of Safety, as the sole defendant in this action.

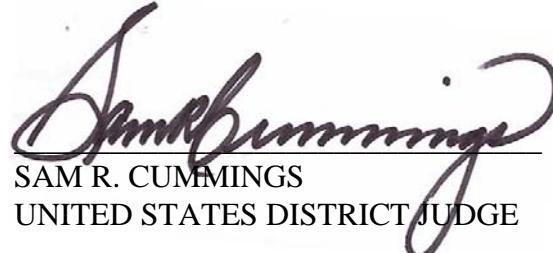
While it is clear that McCraw, as the head of the state agency responsible for the administration of the concealed handgun licensing scheme, is a proper defendant with regard to Plaintiffs' challenge to Texas Government Code § 411.172, the Court has misgivings as to whether or not McCraw is the proper defendant with regard to Plaintiffs' challenge to Texas Penal Code § 46.02. *See Okpalobi v. Foster*, 244 F.3d 405, 416 (5th Cir. 2001) (en banc) (quoting *Ex parte Young*, 209 U.S. 123, 155-56 (1908)) (The *Ex parte Young* exception to Eleventh Amendment immunity "only applies when the named defendant state officials have

some connection with the enforcement of the act and ‘threaten and are about to commence proceedings’ to enforce the unconstitutional act.”).

Therefore, the parties are ordered to file additional briefing within 30 days of the date of this order addressing the applicability of Eleventh Amendment immunity with regard to Plaintiffs’ challenge to Texas Penal Code § 46.02, if any, as well as the applicability of the *Ex parte Young* exception, if any.

SO ORDERED.

Dated October 20, 2011.



SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE